Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules **MM Docket No. 94-123**

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REPLY COMMENTS OF THE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

[redacted]

INTV has learned that at least several copies of Exhibit One to INTV's reply comments in this proceeding, filed May 26, 1995, were missing pages 29-36. To assure no inconvenience to the Commission, INTV herewith is submitting the possibly missing pages.

Respectfully submitted,

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List A B C D E

Although PTAR handicaps ABC, CBS, and NBC affiliates to benefit independent stations, there is no evidence that this benefit has been sufficient, given the many other factors at work, to account for any portion of the growth of independent stations.[72]

PTAR contributed significantly to the growth of independent stations, as shown by INTV's research:

> Our time series results lead to the conclusion that the growth in the number of independent stations in the 1980s was a predictable long run impact from the improved ratings performances PTAR created in the 1970s. Entry is a long run phenomenon, occurring only after it is perceived that long run rates of return have increased.[73]

Thus, reliable evidence now exists to confirm that the Prime Time Access Rule contributed to the growth in the number of independent television stations.

By prohibiting ABC, CBS, and NBC affiliates in the top-50 markets from carrying off-network programming during the access period, PTAR has reduced the overall demand for off-network programming during the access period....When curtailed syndication opportunities reduce total earnings, the incentive that a program producer has to invest in program quality is reduced. By reducing this incentive, PTAR reduces the quality of first-run shows the public sees on ABC, CBS, and NBC.[74]

Initially, one must note that if the networks programmed the access period, an underlying assumption of all analyses based on comparing pre- and post-PTAR data, then the demand for off-network programming would be considerably reduced.[75] Affiliates would clear first-run network programming, displacing the first-run syndicated programming they now broadcast in access. Independents would be programming at least a half hour less of early fringe/prime access, the period in which they now rely heavily on off-network programming.[76] In that circumstance, however, the networks apparently are unconcerned about effects on the back-end market for their prime time programming. This suggests a perception on their parts that any reduction in back-end value would cause the networks no harm.

In any event, the networks have an enormous incentive, given their fierce competition with each other and with other video providers, to exhibit the highest quality programming in order to maximize their audience and revenues. Producers share this incentive to produce popular, quality programming because syndication is the pot of gold at the end of the rainbow. No added impetus, in the form of a marginal increase in future back-end value, appears necessary to stimulate top quality programming on the networks.

Finally, to accept this argument, one must embrace the dubious premise that any increase in back-end value would flow to producers, who then would re-invest the revenues in program quality. In all likelihood, the networks would insist successfully on lower license fees.

[P]rograms shown on Fox will benefit from an artificial impetus to their quality, just as the quality of ABC, CBS, and NBC programming is depressed. This distortion in quality results in further warping of the competition between Fox and ABC, CBS, and NBC.[77]

This benefits the networks' shareholders, but does nothing for the viewing public.

Reality fails to substantiate this theory. Off-Fox programming has enjoyed no significant market among affiliates of the entrenched networks. Off-Fox programming comprised only 4.6 percent of access programming on affiliates of the three entrenched networks in the top 50 markets in November, 1993, according to INTV's analysis, and only 4.9 percent of access programming on affiliates of the three entrenched networks in the top 50 markets in November, 1994, according to Appendix H of the *Economic Analysis*.[78] Similarly, even in non-PTAR markets, off-Fox programming comprised 4.4 percent of access program hours on affiliates.[79] This far from suggests that affiliates rush to bid up the price of off-Fox programming.

Also not to be neglected is Fox's equally artificial (*i.e.*, regulation-based) disadvantage stemming from its still predominantly UHF affiliate base. The entrenched networks benefit mightily from this equally artificial advantage in spectrum allocation and ought resist more readily the temptation to throw stones at Fox's allegedly glass house.

Reducing the back-end value of off-network programs is a consequence of the restriction on broadcasting off-network programs during the access period in the top-50 markets. Total payments to suppliers of network programs are reduced. PTAR's effective prohibition on network programming in the access period likewise reduces the demand for programming by restricting purchases by the networks. Both distortions reduce revenues flowing to program suppliers, a group PTAR was ostensibly intended to benefit. For the reasons indicated above, expenditures on programming that replaces ABC, CBS, and NBC broadcasts are not likely to compensate for this lost revenue.[80]

This analysis conveniently neglects the enormous increase in demand for programming resulting from new independent stations and, more recently, emerging networks -- each of which is rooted in the fertile soil of the Prime Time Access Rule.

Furthermore, demand for programming is not reduced by the Prime Time Access Rule. Affiliates continue to need programming for the access period. Their PTAR-based reliance on first-run syndicated programming has stimulated (if not created) that market, which now is more vibrant and competitive than ever.

Because affiliates of ABC, CBS, and NBC cannot show off-network programming during the access period, Fox and Fox affiliates gain a competitive advantage in several ways....Of course, all these points apply as well to the newest broadcast networks, UPN and WB.[81]

Whatever advantage they may have, Fox and its affiliates remain handicapped in most markets by their UHF channel assignments with which they must compete with VHF affiliates of ABC, CBS, and NBC. On any basis of comparison -- broadcast hours, audience, programming expenditures, network compensation, profits -- Fox and its affiliates simply cannot be equated with the three entrenched networks and their affiliates.

Furthermore, PTAR would apply to Fox or any other emerging network if and when it fell within the definition of network for purposes of the Prime Time Access Rule -- *i.e.,* when an emerging network more nearly approaches the scope and dimension of the entrenched networks. Certainly, if the economies and efficiencies of networking are so substantial, no real reason exists for an emerging network to stop short of the line just to remain outside the scope of the Prime Time Access Rule.

...[I]f PTAR were not in place, a significant number of network affiliates in the top-50 markets would also be showing off-network programming in place of what is currently shown. Eliminating PTAR would permit these stations to compete for the most attractive programming. Stations also would be better able to choose programming that maximizes the audience flow from one program to another, thereby competing more effectively for audiences during prime time and possibly increasing the size of the total television audience.[82]

This is consistent with the views of INTV and its consultants, provided only the off-network portion of the rule is jettisoned.[83] However, if the entire rule is repealed, then one also might predict that network programming would replace first-run syndicated programming on affiliates during access.

Moreover, if only the off-network portion of the rule were repealed, then audiences more likely would decline. Again, network affiliates will seek to maximize profits not audience.[84]

One of the purposes of PTAR was to stimulate a healthy industry of producers, distributors, packagers, and syndicators independent of ABC, CBS, and NBC. Yet it is far from clear that PTAR was in any sense necessary to achieve this.[85]

This ignores the purpose of PTAR to stimulate *prime time* first-run syndicated programming independent of the three entrenched networks. Only via the Prime Time Access Rule does that market exist. In the absence of the rule, either network or off-network programming would supplant first-run programming in prime access. The market for network quality syndicated programming for prime time use would vanish. Thus, PTAR was essential and remains essential to the development and continuation of this market.[86]

[T]here is no basis today for the belief that the producers of original video programs require government-aided access to the top market affiliates of ABC, CBS, and NBC to get their programs before the public....Absent the rule, independent broadcasters would likely counter-program first-run network programs on ABC, CBS, and NBC affiliates with first-run syndicated programming during the access period. Many independents already broadcast first-run syndicated programs in prime time opposite first-run network broadcasts.[87]

If the Prime Time Access Rule were repealed, network affiliates would program either network or off-network programming during the access period. Every argument in the *Economic Analysis* relating to consumer welfare assumes that network programming would replace first-run syndicated programming in access. The *Economic Analysis* also predicts that given the option to do so, network affiliates would substitute off-network programming for first-run syndicated programming in access.[88] Therefore, in the absence of the Prime Time Access Rule, program producers' access to the prime time schedules of large VHF network affiliates would be foreclosed. Substantial basis, thus, exists for a rule which assures program producers the ability to compete for *prime time* clearances on the most popular (via their VHF facilities) stations without seeking to enter via the network funnel.